In the Supreme Court of the United States.

October Term, 1921.

Julius F. Smietanka, as collector of internal revenue of the United States for the first district of Illinois, petitioner, *v.* First Trust & Savings Bank, trustee under the last will and testament of Otto Young, deceased, respondent.	No. 540.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This case is here on writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit (268 Fed. 230), which reversed the judgment of the District Court for the Northern District of Illinois, sustaining a general demurrer to the declaration.

This is an action brought by respondent trustee to recover taxes assessed under the provisions of the income tax act of October 3, 1913 (38 Stat. 166). The declaration makes the following statement of facts:

The First Trust and Savings Bank, respondent, is trustee under the last will and testament of Otto Young. The will of Otto Young, after providing for certain annuities, and for the disposition of certain portions of the income from his estate during the lives of his widow and four daughters, and until his youngest surviving grandchild attained the age of twenty-one, contained the following provision:

> Sixth. When the last survivor of my daughters shall have deceased and the youngest surviving child of my daughters shall have attained the age of twenty-one (21) years, all of said trust estate then remaining in the hands of said trustee shall be divided in equal shares between my grandchildren, the surviving issue of any deceased grandchild to stand in the place of and receive the share which such deceased grandchild would have been entitled to receive if then living. * * * The excess, if any, of the income of said trust estate, over and above the payments hereinbefore provided to be made therefrom, shall be accumulated in the hands of said trustee and form a part of the said trust estate, subject to the like control and power of disposition on the part of said trustee, as the principal of said trust estate. (R. 32.)

The widow and four daughters of Otto Young survived him and were living at the end of the calendar year 1915. (R. 4.)

Respondent, as trustee, filed with the proper collector of internal revenue a return of the income received and accrued during the years ending De-

cember 31, 1913, 1914, and 1915, under the last will of Otto Young, showing the several amounts of income paid or accrued to each beneficiary and the amount of income retained and accumulated in the hands of the trustee under the terms of the will. (R. 4, 9, 17.) Upon these returns the Commissioner of Internal Revenue determined the amounts that had accumulated in the hands of the respondent, as trustee, for each of the calendar years 1913, 1914, and 1915. (R. 4, 9, 17.) Against this accumulation of income the collector of internal revenue assessed against the trustee for each of the years 1913, 1914, and 1915, an income tax upon the basis that the income tax act of 1913, levied a normal tax and surtaxes upon trustees with respect to trust income accumulated in their hands in the same manner that it levied a normal tax and surtaxes upon individuals with respect to the income arising or accruing to them during a calendar year. (R. 5, 10, 17.) The amounts thus assessed by the collector after certain credits had been allowed for the years 1914 and 1915 are as follows (R. 5, 10, 17):

For the year 1913	$10, 915. 24
For the year 1914	14, 126. 88
For the year 1915	11, 596. 57

The respondent paid these several amounts of taxes under protest, and thereafter filed with the collector of internal revenue claims for refund of these taxes, which claims were rejected. (R. 5–8, 10–15, 17–22.) Recovery of these amounts is sought in the present suit.

The question involved is whether the income tax act of 1913 levies a normal tax and surtaxes on trustees with respect to trust income accumulated in their hands for unascertained beneficiaries in the same manner that the act levies like taxes upon individuals with respect to their individual incomes.

ARGUMENT.

The income tax law of 1913 levies the normal tax and surtaxes on trustees with respect to trust income accumulated in their hands for unascertained beneficiaries.

A. THE ACT SO PROVIDES.

The act of October 3, 1913, Sixty-third Congress, first session, c. 16, is entitled "An act to reduce tariff duties and to provide revenue for the Government, and for other purposes." It contains four parts, each designated as a "Section," each of which would ordinarily form a separate and distinct act of itself.

Section I contains a complete revision of the tariff.

Section II contains the first income tax law of the United States after the adoption of the sixteenth amendment to the Constitution.

Section III is a revision of the laws relating to the collection of customs.

Section IV authorizes the President to enter into trade agreements with other nations, levies tariff duties on goods from the Philippine Islands, exempts goods from Porto Rico from tariff duties, and con-

tains a number of miscellaneous provisions relating to imports and to the revenue laws.

All of the Sections are paragraphed alphabetically, and many paragraphs contain subdivisions.

While in a general way different topics covered in the income tax provisions in Section II are separated into different paragraphs, the arrangement is not exact. Entirely unrelated topics are in some cases grouped in a single paragraph and provisions relating to the same topics are in some cases found in widely separated paragraphs.

Subdivision 1 of Paragraph A levies a normal tax upon individuals.

Subdivision 2 of Paragraph A levies surtaxes upon individuals, requires individuals subject to surtaxes to make a return of their net income to the Commissioner of Internal Revenue, and provides that the surtaxes shall be levied upon individuals with respect to any surplus accumulated by corporations for the purpose of avoiding these taxes.

Paragraph B sets forth the basis upon which net income shall be determined.

Paragraph C states the exemptions allowed.

Paragraph D states the manner in which individuals subject to tax shall make a return of their net income; requires all those making fixed annual disbursements of income to individuals subject to tax to withhold the normal tax from the income disbursed and to make a separate return of the income

of each person from which the normal tax has been thus withheld; makes members of a partnership subject to income tax only in their individual capacity, but subject to the tax whether the profits of the partnership be divided or not; provides that those subject to the normal tax only need not make a return of dividends from corporations subject to a normal tax; and authorizes the collector to increase the amount of the return in any case in which he believes that the amount of income is understated.

In addition to the above, Paragraph D contains the following provision:

> Guardians, trustees, executors, administrators, agents, receivers, conservators, and all persons, corporations, or associations acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals.

Trustees and other fiduciaries were made subject to all the provisions of "this section" which apply to individuals. The words, "this section," refer to Section II of the act of October 3, 1913, containing the income tax provisions of that act. Section II does not contain separate sections. The words, therefore, can not properly be construed to apply to a mere subdivision of the section. Any possible doubt as to the meaning of the words is set at rest by their use throughout Section II to

refer to Section II and not to a mere subdivision of the section. Fourteen instances of this use of these words have been collected in a note.[1]

Paragraph D must be read as providing that trustees and other fiduciaries are subject to *all* the provisions of the income tax law applying to individuals. Trustees are thereby made subject to the normal tax and the surtaxes which the act levies upon individuals. They are subject to these taxes with respect to the trust income which the preceding clause requires them to return for taxation.

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[1] A. Subdivision 2. "All the provisions of *this section* relating to individuals who are to be chargeable with the normal income tax, so far as they are applicable and are not inconsistent with this *subdivision* of *Paragraph A*."

B. "The net income from property owned and business carried on in the United States by persons residing elsewhere shall be computed upon the basis prescribed in *this paragraph* and that part of *paragraph G* of *this section* relating to the computation of the net income of corporations."

D. "On or before the 1st day of March, 1914, and the 1st day of March in each year thereafter, a true and accurate return, under oath or affirmation, shall be made by each person of lawful age, except as hereinafter provided, subject to the tax inposed by *this section*" (the tax referred to is imposed under Paragraph A).

D. "and the share of the profits of a partnership to which any taxable partner would be entitled if the same were divided, whether divided or otherwise, shall be returned for taxation and the tax paid, under the provisions of *this section*" (Paragraph E contains provisions governing payment of tax).

E. "Except in cases of refusal or neglect to make such return and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall * * * make a return upon information obtained as provided for in *this section*" (Provisions enabling Commissioner to obtain information contained in Paragraph I).

E. "All persons * * * are hereby authorized and required to deduct and withhold from such annual gains, profits, and income such sum as will be sufficient to pay the normal tax imposed thereon by *this section*" (normal tax imposed by Paragraph A).

E. "In all cases where the income tax of a person is withheld and deducted and paid or to be paid at the source, as aforesaid, such person shall

The requirement of a return by trustees in itself evidences that they were subject to taxes. Under the income tax act of 1913 the obligation of making a return of income and the obligation of paying the tax assessed by the Commissioner of Internal Revenue on the basis of the return are reciprocal. The act requires returns only from those subject to taxes, either in behalf of themselves or of others, and only to the extent of the tax imposed.

Paragraph D requires every person of lawful age "subject to the tax imposed" by the section to make a return of his entire net income. It further requires corporations making disbursements of fixed annual income to persons subject to tax to make a

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not receive the benefit of the deduction and exemption allowed in *paragraph C of this section.*"

E. "Nor shall any person under the foregoing conditions be allowed the benefit of any deduction provided for in *subsection B of this section.*"

E. "but in each case the benefit of the exemption and the deduction allowable under *this section* may be had by complying with the foregoing provisions of *this paragraph.*"

K. "That jurisdiction is hereby conferred upon the district courts of the United States for the district within which any person summoned under *this section* to appear to testify" (Paragraph I contains provisions for summoning persons to appear).

L. "That all administrative, special, and general provisions of law * * * not inconsistent with *this section* are hereby extended and made applicable to all the provisions of *this section* and to the tax herein imposed" (All of Paragraph L).

M. "That the provisions of *this section* shall extend to Porto Rico and the Philippine Islands * * * That the jurisdiction of *this section* conferred upon the district courts" (Paragraph L conferred jurisdiction).

M. "That nothing in *this section* shall be held to exclude from the computation of the net income the compensation paid any individual by the governments of the District of Columbia."

N. "That for the purposes of carrying into effect the provisions of Section II of this act, and * * * bringing to trial and punishment persons guilty of violating the provisions of *this section*" (Paragraph N contains only appropriations).

return of this income and to pay the normal tax on the income thus returned. Paragraph G (c) requires corporations subject to tax under Section II to make return of their entire net income. On the other hand partnerships, not being subject to tax, are not required to make a return of their net income; but in order to enable the Commissioner of Internal Revenue to obtain information from them they are required, *when requested by him,* to forward a *statement* of their profits and the names of the individuals entitled thereto. The information which may be thus required is not referred to as a "return".

Merchants Loan & Trust Company v. *Smietanka* (255 U. S. 509) held that trustees could be taxed under the income tax act of October 3, 1917, by reason of an accretion of value realized upon a sale of trust property. The first question for decision in that case was whether under the act the trustee was a "taxable person" so that the tax could properly be assessed against the trustee. On this the court said (page 516):

> That the trustee was such a "taxable person" is clear from section 1204 (1) (c) of the act of October 3, 1917 (40 Stat. 331), which requires that "trustees, executors * * * and all persons, corporations, or associations, acting in any fiduciary capacity, shall make and render a return of the income of the person, trust, or estate for whom or which they act, and be subject to all the provisions of this title which apply to individuals."

In respect to the question whether or not a trustee is a taxable person, the provisions quoted by the court from the act of October 3, 1917, and the provisions of the act of 1913 here relied upon are practically identical. Each specifically requires trustees to file a return of certain trust income, and each provides that he shall be subject to all the provisions of the income tax act in question which apply to individuals. The case of *Merchants Loan & Trust Company* v. *Smietanka*, in stating that a trustee is a taxable person by virtue of these provisions, is authority also for the view that he is taxable under the act of 1913 with respect to trust income coming into his custody or control and management.

If, then, trustees are taxable under the act of 1913, and if they are in this respect subject to the same normal tax and the same surtaxes imposed upon individuals, the question arises as to the nature of the trust income taxable to trustees under the act of 1913.

Trustees are required to make a return of the net income coming into their "custody or control and management." The word "custody" is defined by the New Standard Dictionary as "A keeping as by one who in the act assumes responsibility for the safety of that entrusted; watch; care; guardianship; charge."

By Bouvier's Law Dictionary it is defined as "the care and possession of a thing."

In *Martin* v. *United States* (168 Fed. 198, 204) the court said:

> "Custody" means keeping, and implies responsibility for the care and guarding against harm of the person or thing entrusted to the custodian.

"Control" is defined by the New Standard Dictionary as "The act of controlling; guidance. Regulating power; restraining or directing influence; check; regulation."

"Management" is defined by the same authority as "The act, art, or manner of managing, carrying on, directing, treating, or conducting; administration; direction; superintendence."

In *Randall* v. *Josselyn* (59 Vt. 557) the Supreme Court of Vermont said:

> The "control and management" of property, which the will gives him, manifestly does not include the power of disposal. It gives him the use, possession, superintendence and direction of the property, and the power of exercising a general restraint over the same until the happening of the event that will determine who takes the property in fee simple absolute (pp., 561–562).

In *Bramell* v. *Cole* (136 Mo. 201) the court said:

> The ordinary meaning of the word "control," when asserted of a person in charge of an estate, is that he has its management. It might imply a power to vest and reinvest, but does not imply a power to dispose of the estate itself so as to defeat the rights of those

entitled to its future use. It implies such powers as are usually conferred upon trustees of express trusts (p. 213).

The fiduciaries required to make returns are those who receive income for the purpose of guarding and preserving it and exercising a continuing control over it, not those who merely dispose of it. The law, in other words, applies to trustees who accumulate, or at least do not immediately disburse, the trust income which they receive.

It is to be noted that the "custody or control and management" of the trustee to which the act makes reference is the custody of the income from trust estates rather than the custody of the estates themselves. In the usual case of a trust the trustee has the custody or control and management of the trust estate, but not of the trust income—this he merely disburses to the proper beneficiaries. The words of the act therefore are appropriate to refer, not to all trust income, but to income which fiduciaries are required to accumulate, or which they receive during the period of administration before the interests of separate beneficiaries have been ascertained.

It is significant that in the clause succeeding that dealing with fiduciaries very different language is used with reference to the obligations imposed upon disbursing agents. This clause of paragraph D provides:

> All persons * * * in whatever capacity acting, having the control, receipt, disposal, or payment of fixed or determinable annual or

> periodical gains, profits, and income of another person subject to tax, shall in behalf of such person deduct and withhold from the *payment* an amount equivalent to the normal income tax upon the same * * *.

This clause refers unmistakably to those who make disbursements of income rather than to those who retain the income of another within their control and management. The emphasis upon *payment* in the above clause not only shows that the clause applies to those who make disbursements of income, but it also indicates that when the preceding clause refers to income coming within the *control and management* of fiduciaries it applies primarily to income which the fiduciaries named do not disburse, but retain.

An interpretation of the fiduciary clause of the act of 1913 as applying to the undistributed income of trust estates makes the clause a reasonable and logical part of the act; any other interpretation deprives it of potency. The act requires beneficiaries to make a return of their income from all sources, including that received or accrued from trust estates, and to pay the tax assessed thereon. Since the individual beneficiary must make a return of the trust income received by him or accrued to him during the calendar year, there is no reason why the act should require the fiduciary to make further return of this same income. But income accumulated by trustees, or income accruing to an estate in process of administration and prior to the time when individual interests have been ascertained, would not be included

within the return of individual beneficiaries or be taxed to them. The act, therefore, required fiduciaries to return for taxation this income and to pay the tax assessed against it in the same way that an individual must return his individual income for taxation and pay the tax assessed against it.

The respondents may emphasize the fact that the words of the act are not merely that trustees must make a return "of the net income coming into their custody or control and management" but that the act states that they must make a return "of the net income *of the person for whom they act*, subject to this tax, coming into their custody or control and management." It may be contended that this means that a return is required only when the beneficiary of the income and his interest in it are known.

To understand the meaning of the italicized words the entire fiduciary clause must be considered. It first provides—

> Guardians, trustees, * * * acting in any fiduciary capacity, shall make and render a return of the net income * * *.

The first words in the clause provide that fiduciaries make a return of net income. It was then necessary to designate specifically that the income as to which a return was required was the income which the fiduciary received in his fiduciary capacity; in other words, the income of the trust. The clause therefore provided that fiduciaries should make a return of the income "of the person for whom they act"; that is to say, the income of the ultimate bene-

ficiary. Without the words, "of the person for whom they act," there would be nothing in the clause which would clearly indicate that the return which these fiduciaries are required to make relates solely and exclusively to trust income.

The different requirements of the law with respect to disbursing agents are significant. Paragraph D requires all those who disburse fixed annual income to persons subject to tax to deduct and withhold the normal income tax therefrom, "and make and render a return, as aforesaid, but *separate and distinct*, of the portion of the income of *each person* from which the normal tax has been thus withheld, and *containing also the name and address of such person or stating that the name or the address, as the case may be, are unknown.*"

The disbursing agent is to make a separate return as to the income of *each* taxable person passing through his hands. He is, if possible, to furnish the name and address of each such person. The entire income passing through the hands of a disbursing agent is not treated as a unit and taxed as such, but a separate tax is levied upon the income of each separate recipient. Disbursing agents, accordingly, are required to make separate returns for the individual recipients of income, and are required to furnish information to identify these individual recipients. Fiduciaries, on the other hand, are not required to make a separate return for the income of each separate beneficiary, nor are they

required to furnish any information to identify them. This shows that in the case of trust income accumulated in the hands of a fiduciary, the tax is levied, not on the income of the individual beneficiaries, but on the accumulated trust income treated as a unit.

The difference between the requirements imposed by paragraph D in the case of partnerships and the requirements imposed in the case of fiduciaries should also be noted. Paragraph D provides that persons carrying on business in partnership are liable for the income tax only in their individual capacity. It further enacts:

> Any such firm, when requested by the Commissioner of Internal Revenue, or any district collector, shall forward to him a correct statement of such profits and the names of the individuals who would be entitled to the same, if distributed.

In the case of partnerships the tax is upon the separate individual interests in a common fund. The law therefore provides that information can be obtained concerning these individual interests. In the case of fiduciaries, the law does not provide for the furnishing of information concerning the individual interests of the beneficiaries in the trust funds made taxable by the fiduciary clause. The inference to be drawn from the omission is that in that case the tax is imposed, not on the individual interests in the trust income coming into the custody

or control and management of fiduciaries, but upon the fund as a whole as it remains in their hands.

Paragraph D requires fiduciaries to make a return of the net income "of the person for whom they act, *subject to this tax*, coming into their custody or control and management." The respondents may contend that the italicized words evidence that a return was required only if the income of the beneficiaries was taxable under the act of 1913, and that therefore a return was required only of the income of ascertained beneficiaries.

The act of 1913 gave certain exemptions from the tax which it imposed, as, for example, religious and charitable corporations. It must be supposed that Congress did not intend to tax income accumulated for the beneficiary where the income received directly by that beneficiary was not taxed by the act. In providing that trust income accumulated in the hands of fiduciary must be returned for taxation, Congress limited the obligation to beneficiaries subject to the income tax imposed by the act of 1913. If a fiduciary could show that although income was being accumulated in his hands, the beneficiary was definitely ascertained and was not taxed by the act of 1913, then no return of income for taxation was required of him. This is the significance of the words, "subject to this tax," appearing after the words, "of the person for whom they act."

To give the words any broader scope, and to make imposition of a tax dependent upon affirmative evidence that the ultimate beneficiaries are taxable

under the act of 1913, is to nullify the entire clause dealing with fiduciaries. To assert that no tax is imposed on accumulated trust income until the ultimate beneficiaries have been ascertained and found to be taxable, is to assert that the act does not tax this income, since accumulations of trust income almost invariably involve either unascertained beneficiaries or beneficiaries whose respective interests are unascertained.

B. THIS CONSTRUCTION ACCORDS WITH THE PURPOSE OF THE ACT.

The income tax law of 1913 was not a measure reaching only certain particular kinds of income, but it was a comprehensive enactment covering every kind of income to which the taxing power of the United States extends. By subdivision 1 of paragraph A an income tax was levied upon the entire net income of all citizens of the United States wherever resident and upon the entire net income of all those resident in the United States whether citizens or not; and in respect to aliens resident outside the United States the tax was levied upon their entire net income from all property owned and every kind of business carried on in the United States. By paragraph G (*a*) an income tax was levied upon the entire net income of every corporation, joint-stock company or association, and every insurance company organized in the United States.

Wherever public policy dictated an exemption from taxation, as in the case of beneficial associations and religious and charitable corporations,

this was done by an express proviso.[1] Likewise income which it was beyond the constitutional power of the United States to tax was in express terms excepted from tax.[2]

Since the income-tax law of 1913 shows the intention of Congress to reach all income within its taxing power which it did not specifically exempt, if there be any doubt as to whether the language of the act reaches income accumulated in the hands of trustees for unascertained beneficiaries, the doubt must be resolved in favor of taxation of such income. In construing the act the primary purpose is to carry out the legislative intent. (*United States* v. *Crosley*, 196 U. S. 327.) While this court has said that in interpreting tax laws it will not extend their provisions by implication beyond the clear import of the language used (*Gould* v. *Gould*, 245 U. S. 151, 153), nevertheless, in tax laws, as in other laws, the primary concern is to give effect to the legislative intent. In *Cliquot's Champagne* (3 Wall. 114, 145) the court said:

> Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. * * * They should be so construed as to carry out the intention of the legislature in passing them, and most effectually accomplish this object.

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[1] First proviso of Paragraph G (a).

[2] Last sentence in Paragraph B; second proviso in Paragraph G (a).

Not only do the provisions of the income tax law of 1913 show a purpose to reach all taxable income, but they show that Congress was particularly concerned that accumulated or undistributed income should not escape taxation. Subdivision 2 of Paragraph A provides:

> For the purpose of this additional tax the taxable income of any individual shall embrace the share to which he would be entitled of the gains and profits, if divided or distributed, whether divided or distributed or not, of all corporations, joint-stock companies, or associations however created or organized, formed or fraudulently availed of for the purpose of preventing the imposition of such tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed;

Since the income received by individuals from corporations was subject to surtaxes, in order to avoid these taxes stockholders of a corporation might allow its income to accumulate as surplus instead of distributing it as dividends to the individual stockholders. To prevent this the above provision was inserted in the law. But if the accumulated income of trust funds, where the beneficiary is unascertained, was not taxed by the law of 1913, the taxpayer could avoid not only surtaxes but the normal tax as well by a device much simpler than the accumulation of corporate income in the hands of a corporation.

If the income tax law of 1913 did not tax income accumulated for unascertained beneficiaries, the taxpayer could escape taxation by the simple expedient of creating a trust with uncertain beneficiaries with a provision for accumulation of income. By making the trust revocable the taxpayer could at the same time retain control over his property so that he could at any future time get back both the corpus of the trust and the income accumulated under it. The fact that the law does not specifically guard against trusts of this character or make specific provision for the taxation of the income of such trusts, while it does make specific provision for the taxation of corporate accumulations not legitimately made as a part of the corporate enterprise, indicates clearly that Congress regarded the income tax law of 1913 as containing provisions which levied a tax upon trust income accumulated in the hands of a trustee for unascertained beneficiaries.

It is unreasonable to suppose that Congress intended to leave a loophole in the income tax law of 1913 by which individuals might evade payment of the tax which the law imposed upon individual incomes. It is also unreasonable to suppose that Congress intended to except from taxation income accumulated in the hands of trustees for unascertained beneficiaries when it levied a tax upon all other taxable income. This court has said that it does not favor a construction of a statute which leads to absurd or unreasonable results.

In dealing with the taxation of partnerships Paragraph D provides:

> and the share of the profits of a partnership to which any taxable partner would be entitled if the same were divided, *whether divided or otherwise*, shall be returned for taxation and the tax paid,

Here again Congress in the act of October 3, 1913, made express provision to prevent undistributed income from escaping taxation.

The act of September 8, 1916 (39 Stat. 756), which specifically levied a normal tax and surtaxes on fiduciaries with respect to trust income accumulated in their hands in the same manner that like taxation was levied upon individual income, seems to settle any doubt as to the meaning of the act of 1913. Section 2(b) of the act of 1916 provides:

> SEC. 2(b). Income received by estates of deceased persons during the period of administration or settlement of the estate, shall be subject to the normal and additional tax and taxed to their estates, and also such income of estates or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests, and income held for future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or

> trustee, as the case may be: *Provided*, That where the income is to be distributed annually or regularly between existing heirs or legatees or beneficiaries the rate of tax and method of computing the same shall be based in each case upon the amount of the individual share to be distributed.
>
> Such trustees, executors, administrators, and other fiduciaries are hereby indemnified against the claims or demands of every beneficiary for all payments of taxes which they shall be required to make under the provisions of this title, and they shall have credit for the amount of such payments against the beneficiary or principal in any accounting which they make as such trustees or other fiduciaries.

The income tax provisions of the act of September 8, 1916, were designed to raise greater revenue by increasing surtaxes. The provisions of the income tax act of 1913 were reenacted in this act, with new paragraphing and with such further changes as would clarify its meaning. Section 2(b) of the act as quoted above appears in the bill originally reported by the House Ways and Means Committee, except that the proviso at the end of the first paragraph was added to the House bill by the Senate Finance Committee. The report of the chairman of the House committee on the bill (H. R. 922, 64th Cong., 1st sess.) states:

> The present income tax law has given general satisfaction. The practical demon-

stration of the law, however, has suggested changes or modifications of some of the minor and administrative provisions, the effect of which will be both to clarify and better adjust such provisions to some of our complicated business conditions and to facilitate administration of the law.

After the above general statement the report of the chairman refers to and explains a number of changes which the reported bill will make in the existing law. No reference is made to any change in the taxation of accumulated trust income. If the committee had supposed that trust income accumulated in the hands of trustees for unascertained beneficiaries was not taxed by the existing law, the chairman's report would certainly have drawn attention to this important change which the reported bill would make in the existing law. No such reference having been made, it seems clear that the committee regarded the pending bill as making no change in the law in this respect.

This court has frequently recognized that a later act making explicit a disputed construction of a prior act is not an indication that the existing law has been changed, but is rather an indication of the legislature's construction of the prior law.

In *Bailey* v. *Clark* (21 Wall. 284, 288) this court said that a later act which made explicit a disputed construction of a prior act "was evidently intended to remove any doubt existing as to the meaning

of the statute and declare its true construction and meaning."

Wetmore v. *Markoe* (196 U. S. 68, 77) is to the same effect.

In *Johnson* v. *Southern Pacific Company* (196 U. S. 1) the court held that a certain construction of an earlier act was not affected by an explicit provision to this effect in a later act. Of the later act it was said (p. 21):

> This legislative recognition of the scope of the prior law fortifies and does not weaken the conclusion at which we have arrived.

United States v. *Coulby* (251 Fed. 982) involved, like the present case, the question whether the enactment in the act of September 8, 1916, of provisions explicitly covering a certain construction which had been given to the income tax law of 1913 was or was not evidence that Congress believed that the later law modified the earlier law. The judge said (p. 985):

> Counsel for plaintiff * * * urge that this is a change of the law, and evidences a belief of the law-making body that the 1913 income tax law had provided differently. I do not agree with this contention. In my opinion, this provision was inserted in the 1916 act to put at rest the present controversy, rather than to change the law, and is to be regarded only as a legislative recognition of the scope and intent of the prior law.

The instant case is an unusually strong one for the application of the principle of the foregoing decisions.

The portion of the law of 1916 which interpreted the provisions of the law of 1913 relating to the taxation of accumulated trust income was a part of the bill as originally reported in 1916. The chairman of the committee reporting the bill in 1916 expressed general satisfaction with the earlier law, but stated that certain of its minor provisions needed clarification. He then set forth changes which the bill would make in the existing law, but did not mention any change in the taxation of accumulated trust income.

The situation presented to the court in *United States* v. *Field* (255 U. S. 257, 265) was very different. In that case the court concluded from what appeared in the report of the House committee on the amendatory act that Congress had not considered the earlier law a safe reliance for the construction which it embodied in the amendatory act.

It has been suggested that to tax the income accumulated in the hands of fiduciaries without regard to the individual interest of beneficiaries may result in greater taxes being paid than if, the beneficiaries being ascertained, a tax was imposed separately on each individual's interest. It is, however, no objection to a tax law that the rate or amount of the tax varies under different conditions. (*Knowlton* v. *Moore*, 178 U. S. 41.) The only practical method for taxing trust income accumulated for unascertained beneficiaries is to tax the entire amount to the trustee without regard to individual interests in the fund. Those who create trust estates with a provision for accumulation can not complain if, as a result of this

provision, a slightly greater tax is paid than would result if it contained no such provision. Finally, the conclusive answer to the suggestion is that Congress in the act of September 8, 1916, in section 2 (b) disregarded the supposed inequity and levied the tax without regard to individual interests in the trust fund except "where the income is to be distributed annually or regularly between existing heirs or legatees or beneficiaries."

It is conceded that an inference may arise that the Treasury Department did not at first regard the undistributed income of an estate as taxable under the new act of 1913, but they did not specifically so rule. The only specific rulings to that effect are contained in certain telegrams and letters sent by officials of the Bureau of Internal Revenue, which rulings, however, do not have the force and effect of Treasury decisions. The first Treasury decision specifically passing upon the point at issue was Treasury Decision No. 2231, issued July 26, 1915, in which the view now advanced by the Government was taken. This decision reads in part as follows:

> The income of trust estates, as any other income, is subject to the income tax. When such income is received annually by a beneficiary of an estate, the fiduciary will withhold the normal tax due and subject to withholding by him. Any part of the annual income of trust estates not distributed becomes an entity and, as such, is liable for the normal and additional tax, which must be paid by the fiduciary. When the beneficiary is not *in*

esse and the income of the estate is retained by the fiduciary, such income will be taxable to the estate as for an individual and the fiduciary will pay the tax, both normal and additional. When the beneficiary receives a part only of the income to which he is entitled from the estate and the balance is retained by the fiduciary, the normal tax will be withheld on the income paid to the beneficiary and the amount of such income retained by the fiduciary will be treated as income taxable to the estate for both the normal and additional tax; which tax will be paid by the fiduciary. When the gross net income not distributed and remaining in the hands of a fiduciary is less than $20,000, the estate will be listed as a beneficiary and only the normal income tax will be assessable and such tax will be paid by the fiduciary. When the gross net income not distributed and remaining in the hands of a fiduciary exceeds $20,000, such income is subject to both the normal and additional tax and the estate will be listed as a beneficiary and both the normal and additional tax will be paid by the fiduciary.

It is not surprising that there should have been for a considerable time uncertainty and confusion as to the meaning of some portions of a law which introduced an entirely novel system of Federal taxation. On July 26, 1915, however, the Commissioner of Internal Revenue, after mature consideration, took the view that under the income tax act of 1913 a trustee must pay the ordinary normal tax and

surtaxes upon the trust income which he withholds and accumulates. From that time to the present the Treasury Department has consistently interpreted the act as having this meaning and as authorizing collection of the taxes which the respondent seeks to recover in the present suit.

CONCLUSION.

The Government contends that the income tax provisions of the act of October 3, 1913, made fiduciaries, while acting in this capacity, subject to the normal tax and surtaxes which that act imposed on the income of individuals; that they were thus taxed upon income accumulated for unascertained beneficiaries; and that the act treated these accumulations as a unit for purposes of taxation.

The Government further contends that an act is to be construed so as to carry out its purposes, as these can be gathered from all its provisions; that the income tax act of 1913 shows a purpose to reach all taxable income not expressly excepted, with particular evidence of the intention of Congress to reach accumulated or undistributed income; that it would be absurd to interpret the act as not applying to accumulated trust income, since such an interpretation would enable individuals to escape the taxes imposed by the act; that the legislative history of the act of September 8, 1916, shows that Congress viewed the act of October 3, 1913, as levying the normal tax and surtaxes upon accumulated trust in-

come; and that this was the final and mature interpretation given to the act by the Commissioner of Internal Revenue.

The Government, therefore, respectfully requests this court to reverse the judgment of the Circuit Court of Appeals for the Seventh Circuit, and to affirm the judgment of the District Court for the Northern District of Illinois sustaining a general demurrer to the declaration.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

ALBERT OTTINGER,
Assistant Attorney General.

CHARLES H. WESTON,
Special Assistant to the Attorney General.

JANUARY, 1922.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

No. 540

JULIUS F. SMIETANKA, AS COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE FIRST DISTRICT OF ILLINOIS,

Petitioner,

vs.

FIRST TRUST & SAVINGS BANK, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF OTTO YOUNG, DECEASED,

Respondent.

BRIEF FOR THE RESPONDENT.

JOHN P. WILSON,
Counsel for the Respondent.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No.

JULIUS F. SMIETANKA, as Collector of Internal Revenue of the United States for the first District of Illinois,
Petitioner,

vs.

FIRST TRUST & SAVINGS BANK, Trustee under the last will and testament of Otto Young, deceased,
Respondent.

BRIEF FOR THE RESPONDENT.

By the petition in this case this court is asked to review a judgment of the Circuit Court of Appeals holding that the Income Tax Act of 1913 did not levy a tax upon income accumulating in the hands of trustees for unknown persons.

The decision of the Court of Appeals is reported in 268 Federal Reporter, 230.

The Government claims that such accumulated income should be taxed as a separate, distinct entity. The Circuit Court of Appeals held that the Income Tax Act of 1913 levied an income tax only upon the income of individuals and upon the income of companies, associations and corporations; and therefore that this law of

1913 did not levy an income tax upon income accumulated for unknown persons in the hands of trustees.

The Income Tax Law was amended September 8, 1916, and a tax was then clearly imposed upon all such accumulations.

That this court may have before it the terms of the statute upon which the question is raised, the rulings of the Internal Revenue Department on the subject, and the amendment to the Act of 1913 in 1916 covering the precise question raised in this case, we make the following citations:

> "The clauses of the Act of 1913 which levy the income tax are as follows:
>
> 'A. Subdivision 1. That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year
> to every citizen of the United States, whether residing at home or abroad,
> and to every person residing in the United States, though not a citizen thereof,
> a tax of 1 per centum per annum upon such income, except as hereinafter provided;
> and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere.
>
> Subdivision 2. In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be levied, assessed, and collected upon the net income of every individual an additional income tax (herein referred to as the additional tax) of
>
> 1 per centum per annum upon the amount by which the total net income exceeds $20,000 and does not exceed $50,000,' etc.
>
> * * * * *
>
> 'G. (a) That the normal tax hereinbefore imposed upon individuals likewise shall be levied, assessed, and paid annually upon the entire net in-

> come arising or accruing from all sources during the preceding calendar year to every corporation, joint-stock company or association, and every insurance company organized in the United States, no matter how created or organized, not including partnerships.' "

The foregoing clauses contain all the provisions of the original Act of 1913, levying or imposing the income tax. Under separate headings, designated by capital letters, provisions are made for defining income to be taxed, for deductions, exemptions, returns, etc., as follows:

> 'B.' This paragraph defines *'the net income of a taxable person,'* and specifies the deductions to be made in computing the income subject to the tax.
>
> 'C.' This paragraph specified the amount to *'be deducted from the amount of the net income of each of said persons'* as an exemption.
>
> 'D.' This paragraph directs the income tax to be computed 'upon the remainder *of said net income of each person subject thereto,'* and provides for the making of returns of income in each year.
>
> 'E.' This paragraph provides for the making of assessments by the Commissioners and that all 'persons shall be notified of the amount for which they are respectively liable.' It also provides for withholding the normal tax at the source.
>
> 'F.' This paragraph provides for penalties to be paid by 'any person, corporation, joint-stock company, association, or insurance company liable to make the return or pay the tax' in case of refusal or neglect, etc.

Rulings of the Treasury Department.

In administering the Act of 1913 the Treasury Department published the following extract of a letter from Deputy Commissioner Speer, dated February 9, 1915

(Corporation Trust Co. Income Tax Service 1915, p. 426):

> "'* * * where, under the express provisions of a will or of State laws, certain income passes into the *corpus* of an estate, to go eventually with the estate to the persons entitled in remainder, the income tax does not attach to, and is not collectible from, the specified income at the time of its receipt by the Executor, whether or not the remaindermen are determinable.
>
> The income tax can be levied only on such income as is *payable* to some natural or artificial person subject to the provisions of the law.
>
> No return is required to be made at the time, therefore, of the gains and profits that pass into the *corpus* of an estate under the provisions of State laws.'"

On July 26, 1915, the Commissioner of Internal Revenue issued new instructions in regard to the assessing and collecting of income taxes, which for the first time sought to enforce a tax upon income accumulated for unascertainable persons in the hands of trustees as an entity, which instructions are, in part, as follows (Corporation Trust Company Income Tax Service 1915, p. 493):

> "Fiduciaries shall, on or before March 1 of each year, make and render a return, in form prescribed by the Commissioner of Internal Revenue, of the income coming into their custody or control and management from each trust estate when the annual interest of any beneficiary in the income of said trust estate subject to the normal tax is in excess of $3,000, and also when the undistributed income of the estate (as an entity or beneficiary in and of itself for tax purposes), consisting of income from dividends of corporations and other income (or of dividends alone), shall exceed $20,000. In such cases the estate shall be reported as a beneficiary for the undistributed income.

Notice of failure to file a return as required shall be served upon the fiduciary.

* * * * *

The income of trust estates, as any other income, is subject to the income tax. When such income is received annually by a beneficiary of an estate, the fiduciary will withhold the normal tax due and subject to withholding by him. Any part of the annual income of trust estates not distributed becomes an entity and, as such, is liable for the normal and additional tax, which must be paid by the fiduciary. When the beneficiary is not *in esse* and the income of the estate is retained by the fiduciary such income will be taxable to the estate as for an individual and the fiduciary will pay the tax both normal and additional. When the beneficiary receives a part only of the income to which he is entitled from the estate and the balance is retained by the fiduciary, the normal tax will be withheld on the income paid to the beneficiary and the amount of such income retained by the fiduciary will be treated as income taxable to the estate for both the normal and additional tax; which tax will be paid by the fiduciary. When the gross net income not distributed and remaining in the hands of a fiduciary is less than $20,000, the estate will be listed as a beneficiary and only the normal income tax will be assessable and such tax will be paid by the fiduciary. When the gross net income not distributed and remaining in the hands of a fiduciary exceeds $20,000, such income is subject to both the normal and additional tax and the estate will be listed as a beneficiary and both the normal and additional tax will be paid by the fiduciary."

The Act of 1916.

By an act approved September 8, 1916, the Income Tax Act of 1913 was revised, and the following new provision was included in the new act:

"Sec. 2 (b) Income received by estates of deceased persons during the period of administration or settlement of the estate, shall be subject to the

normal and additional tax and taxed to their estates, and *also such income of estates or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests, and income held for future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be: Provided,* That where the income is to be distributed annually or regularly between existing heirs or legatees or beneficiaries the rate of tax and method of computing the same shall be based in each case upon the amount of the individual share to be distributed.

Such trustees, executors, administrators, and other fiduciaries are hereby indemnified against the claims or demands of every beneficiary for all payments of taxes which they shall be required to make under the provisions of this title, and they shall have credit for the amount of such payments against the beneficiary or principal in any accounting which they make as such trustees or other fiduciaries."

The amendatory Act of 1916 is of importance not only as showing that the question raised is not one of large interest, as it does not relate to the levy and collection of income taxes now or at any time since 1916, but also as showing that Congress deemed it at least doubtful whether the Act of 1913, without the amendment of 1916, imposed an income tax upon accumulated income as an entity, as was held by this court in regard to a similar amendment in *United States* v. *Field*, decided February 28, 1921, 41 Supreme Court Reporter, 256-258.

Respectfully submitted,

John P. Wilson,

Counsel for the Respondent.

In the Supreme Court of the United States.

October Term, 1921.

Julius F. Smietanka, as collector of internal revenue of the United States for the first district of Illinois, petitioner, *v.* First Trust & Savings Bank, trustee under the last will and testament of Otto Young, deceased, respondent,	No. —

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT.

The Solicitor General, on behalf of Smietanka, collector, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit rendered in the above-entitled case on June 21, 1921, which reversed the judgment of the District Court of the Northern District of Illinois sustaining a demurrer filed by the collector.

STATEMENT.

This is an action brought by respondent trustee to recover taxes paid under protest as a result of the inclusion as income of the amounts which came into

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the control and management of such trustee and which accumulated in its hands for the benefit of unascertained beneficiaries and which was not distributed. The taxes were assessed and collected under the provisions of the Income Tax Act of October 3, 1913, 38 Stat. 166. The District Court sustained a general demurrer filed by the collector; but the Circuit Court of Appeals reversed the decision of the District Court in sustaining this demurrer and on formal appeal by the collector entered judgment in favor of the trustee. It is this judgment of the Circuit Court of Appeals which is now sought to have reviewed.

QUESTION INVOLVED.

The question involved is whether or not the Income Tax Act of 1913 levies a tax upon income coming into the hands of trustees in like manner as it levies a tax upon the income of individuals. The opinion of the Circuit Court of Appeals appears to turn upon the question whether or not an estate is a person within the meaning of the Act.

THE FACTS.

The will of Otto Young, after disposing of the income during the lives of his widow and four daughters and until his youngest surviving grandchild should attain the age of twenty-one, provided:

> 6. When the last survivor of my daughters shall have deceased and the youngest surviving child of my daughters shall have attained the age of twenty-one years, all of said trust

> estate then remaining in the hands of said trustee shall be divided in equal shares between my grandchildren, the surviving issue of any deceased grandchild to receive the share which such deceased grandchild would have been entitled to receive if then living. * * * The excess, if any, of the income of said trust estate, over and above the payments hereinbefore provided to be made therefrom, shall be accumulated in the hands of said trustee and form a part of said trust estate, subject to the like control and power of disposition on the part of said trustee as the principal of said trust estate.

The commissioner assessed and collected taxes on the income coming into the hands of the trustee (and not distributed by him) for the years 1913, 1914, and 1915, amounting to $39,667.38, just as if the trustee were one individual, and suit was thereupon brought by the trustee to recover this amount so assessed and collected, claiming that the Act does not levy a tax on an estate's income as it does on that of an individual.

REASONS FOR GRANTING THE PETITION.

(1) The opinion of the Circuit Court of Appeals seems to turn upon the erroneous assumption that an estate is a person within the meaning of the Act, as the court uses this language as part of its opinion:

> But neither the real estate as valued at Young's death, nor the increase in value, nor the accumulation of rentals, is a citizen or person or corporation, joint stock company or

association, or insurance company, mutual or stock.

(2) The Circuit Court of Appeals is in error in holding that the income of trust estates is not subject to the tax, it clearly being the intent of Congress that all income shall be taxed.

(3) The decision should not be permitted to stand, as in effect it would permit the accumulation of enormous amounts of money for future and unascertained beneficiaries which would escape their just share of taxation under the Income Tax Law.

(4) Such a holding is against public policy and highly detrimental to the interests of the Government in the collection of Revenue under the Act of 1913.

JAMES M. BECK,
Solicitor General.

BRIEF IN SUPPORT OF THE PETITION.

I.

The object and purpose of the Act of 1913 was to tax all income from whatever source derived.

The tax is levied upon the income of every citizen, whether resident in the United States or not, and upon the income of every person residing in the United States, though not a citizen, and is levied upon the entire net income arising or accruing from all sources. It also includes in paragraph G (a) all income of corporations, joint stock companies or associations, and insurance companies. Congress clearly intended that all income should be taxed, as there is a provision in the Act to the effect that nothing in this section shall be construed to release a taxable person from liability for income tax.

II.

The question of whether or not an estate is a person within the meaning of the Act is immaterial.

The question as to the liability of an estate to pay income tax on income received by it and accumulated and not distributed is governed by paragraph D of the Act, which is known as the fiduciary clause and which reads as follows:

> Guardians, trustees, executors, * * * shall make and render a return of the net income of the person for whom they act, subject

> to this tax, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals.

The section referred to in the above quotation is section 2 of the Underwood Tariff Law and is itself the Income Tax Act of 1913. Therefore, it is clear that guardians, etc., are subject to the same provisions as are individuals where the Income Tax Act of 1913 is in question. The word "section" is used again in paragraph E, which provides that "nothing in this section shall be construed to release a taxable person from liability for income tax."

III.

The Act levies the tax directly upon the income in the hands of the trustee.

Referring again to paragraph D of the Act, hereinbefore quoted, guardians, trustees, etc., are required to make return of income coming into their custody or control and management. This applies to income received by a trustee for the purpose of guarding and preserving it, exercising control over it, and includes trustees who accumulates and do not distribute income coming into their hands for the benefit of those for whom they act, and is to be distinguished from those fiduciaries who are required by the withholding clause of the Act to—

> deduct and withhold from the payment an amount equal to the normal income tax upon the same, and make and render a return, as

> aforesaid, but separate and distinct of the portion of the income of each person from which the normal tax has thus been withheld,

and furnish the name and address of such person.

When this part of the Act is compared with paragraph D, quoted above, the intention of Congress fully appears. In the paragraph D the trustees are required to "make and render a return of the net income of the person for whom they act," while in the withholding clause they shall "make and render a return separate and distinct of the portion of the income of each person." It thus appears that Congress in the fiduciary clause had in mind fiduciaries who retained custody of the net incomes of their cestuis que trustent, while in the withholding clause it intended to deal with those persons who had income of others coming into their possession but who distributed it at regular intervals to those to whom it belonged.

CONCLUSION.

It is respectfully submitted that the judgment of the Circuit Court of Appeals is in error, and that the writ of certiorari should be issued as prayed.

JAMES M. BECK, *Solicitor General.*

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

G. NOBLE JONES,
Special Assistant to the Attorney General.

SEPTEMBER 16, 1921.

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IN THE

[Sup]reme Court of the United States.

October Term, A. D. 1921.

No. 540

[JULIU]S F. SMIETANKA, as Collector of Internal Rev[enue] of the United States for the First District of [Illin]ois,

Petitioner,

vs.

[FIRST] TRUST AND SAVINGS BANK, Trustee under the [Last] Will and Testament of Otto Young, Deceased.

Respondent.

[WRI]T OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT.

John P. Wilson,
William B. Hale,
Walter Bruce Howe,
Attorneys for Respondent.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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Citations.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

No. 540.

JULIUS F. SMIETANKA, AS COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE FIRST DISTRICT OF ILLINOIS,

Petitioner,

vs.

FIRST TRUST AND SAVINGS BANK, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF OTTO YOUNG, DECEASED.

BRIEF FOR RESPONDENT.

STATEMENT.

The question presented for decision in this case is whether or not the Income Tax Act of 1913 levied a tax on income held and accumulated in the hands of the First Trust and Savings Bank, of Chicago, as trustee, for the benefit of unborn or unascertained persons.

The amounts levied and collected by the Government upon the income so accumulated for unascertained persons are as follows:

Taxes for the year 1913............	$10,915.24
Taxes for the year 1914............	14,126.88
Taxes for the year 1915............	11,596.57
Total	$36,638.69

The defendant as trustee filed in the office of the Collector of Internal Revenue of the United States for the First District of Illinois, at the dates required by the act, a return of the income received by it during each of the years 1913, 1914 and 1915 in the form prescribed for returns by fiduciaries. These returns showed the several amounts of income paid or accrued to each beneficiary, and the amount of income retained and accumulated under the terms of the will.

Upon said returns the Commissioner of Internal Revenue determined that there was accumulated in the hands of the plaintiff in error, as trustee, the following sums:

For the year 1913 (subsequent to March 1st)	$221,611.05
For the year 1914	281,940.45
For the year 1915	286,354.15

All of these sums were accumulated and added to the capital of the trust in the hands of the trustee under the Sixth Article of the will of Otto Young for the benefit of his grandchildren who may survive at the termination of the trust, and no part thereof can be distributed to any beneficiary during the life of the trust.

No attempt was made to levy or collect any income tax upon these accumulated funds until after July 26, 1915. Income taxes were then assessed upon said accumulated funds against the trustee under the instructions issued by the Commissioner of Internal Revenue on July 26, 1915, hereinafter set forth. The taxes so levied were computed by the Collector upon the basis of treating the entire accumulation in each year as a separate entity, liable for the same normal and surtaxes as an individual receiving a like income would be liable for under the Act of 1913.

The taxes so levied were paid under protest, and upon suit brought to recover back the taxes so paid judgment

was rendered in favor of the trustee, upon the ground that the Internal Revenue Law of 1913 did not levy any tax upon the income so accumulated and remaining in the hands of the trustee.

The clauses of the Act of 1913 which levy income tax are as follows:

> "A. Subdivision 1. That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year
>
> to every citizen of the United States, whether residing at home or abroad,
>
> and to every person residing in the United States, though not a citizen thereof,
>
> a tax of 1 per centum per annum upon such income, except as hereinafter provided;
>
> and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere.
>
> Subdivision 2. In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be levied, assessed, and collected upon the net income of *every individual* an additional income tax (herein referred to as the additional tax) of
>
> 1 per centum per annum upon the amount by which the total net income exceeds $20,000 and does not exceed $50,000," etc.
>
> * * * * *
>
> "G. (a) That the normal tax herein before imposed upon *individuals* likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation, joint stock company or association, and every insurance company organized in the United States, no matter how created or organized, not including partnerships."

The foregoing paragraphs contain all the provisions of the original Act of 1913, which, in terms, levies or imposes a tax upon income. Under separate headings, designated by capital letters, provisions are made for ascertaining the income to be taxed, for deductions, exemptions, returns, etc., as follows:

"B" This paragraph defines *"the net income of a taxable person,"* and specifies the deductions to be made in computing the income subject to the tax.

"C" This paragraph specified the amount to *"be deducted from the amount of the net income of each of said persons"* as an exemption.

"D" This paragraph directs the income tax to be computed "upon the remainder *of said net income of each person subject thereto,"* and provides for the making of returns of income as follows:

"On or before the first day of March, nineteen hundred and fourteen, and the first day of March in each year thereafter, a true and accurate return, under oath or affirmation, shall be made by each person of lawful age, except as hereinafter provided, subject to the tax imposed by this section, and having a net income of $3,000 or over for the taxable year to the collector of internal revenue for the district in which such person resides or has his principal place of business, or, in the case of a person residing in a foreign country, in the place where his principal business is carried on within the United States, in such form as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury shall prescribe, setting forth specifically the gross amount of income from all separate sources and from the total thereof, deducting the aggregate items or expenses and allowances herein authorized;

guardians, trustees, executors, administrators, agents, receivers, conservators, and all persons, corporations, or associations acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and

management, and be subject to all the provisions of this section which apply to individuals:

* * * * *

and also all persons, firms, companies, copartnerships, corporations, joint stock companies or associations, and insurance companies, except as hereinafter provided, in whatever capacity acting, having the control, receipt, disposal, or payment of fixed or determinable annual or periodical gains, profits, and income of another person subject to tax, shall in behalf of such person deduct and withhold from the payment an amount equivalent to the normal income tax upon the same and make and render a return, as aforesaid, but separate and distinct, of the portion of the income of each person from which the normal tax has been thus withheld, and containing also the name and address of such person or stating that the name and address or the address, as the case may be, are unknown:"

"E" This paragraph provides for the making of assessments of income tax by the Commissioners, and that all "persons should be notified of the amount for which they are respectively liable."

Paragraph E also provides for withholding the normal tax at the source, as follows:

"All persons, firms, copartnerships, companies, corporations, joint-stock companies or associations, and insurance companies, in whatever capacity acting, including

lessees or mortgagors of real or personal property,

trustees acting in any trust capacity,

executors, administrators, agents, receivers, conservators,

employers,

and all officers and employees of the United States having the control, receipt, custody, disposal, or payment of interest, rent, salaries, wages, premiums, annuities, compensation, remuneration, emoluments, or other fixed or determinable annual gains, profits, and income of another person, exceeding $3,000 for any taxable year,

other than dividends on capital stock, or from the net earnings of corporations and joint-stock companies or associations subject to like tax,

who are required to make and render a return in behalf of another, as provided herein, to the collector of his, her or its district,

are hereby authorized and required to deduct and withhold from such annual gains, profits, and income such sum as will be sufficient to pay *the normal tax* imposed thereon by this section, and shall pay to the officer of the United States Government authorized to receive the same;

and they are each hereby made personally liable for such tax." (Italics ours.)

* * * * *

"The provisions of this section relating to the deduction and payment of the tax at the source of income *shall only apply to the normal tax hereinbefore imposed upon individuals.*" (Italics ours.)

"F" This paragraph provides for penalties to be paid by "any person, corporation, joint-stock company, association, or insurance company liable to make the return or pay the tax" in case of refusal or neglect, etc.

Vol. 38, U. S. Statutes, pp. 166-170.

RULINGS OF THE TREASURY DEPARTMENT.

In Administering the Act of 1913 the Treasury Department published the following extract of a letter from Deputy Commissioner Speer dated February 9, 1915 (Corporation Trust Co. Income Tax Service 1915, p. 426):

"* * * where, under the express provisions of a will or of State laws, certain income passes into the *corpus* of an estate, to go eventually with the estate to the persons entitled in remainder, the income tax does not attach to, and is not collectible from, the specified income at the time of its receipt by the Executor, whether or not the remaindermen are determinable.

The income tax can be levied only on such income as is *payable* to some natural or artificial person subject to the provisions of the law.

No return is required to be made at the time, therefore, of the gains and profits that pass into the *corpus* of an estate under the provisions of State laws."

Extract from Treasury Decision 1906:

"Fiduciaries having an annual income *not distributed or paid to the beneficiaries* of the trust under which said fiduciary acts shall make an annual list return, as provided herein, and said list return shall show the name and address of each beneficiary having a distributive interest in said income in excess of $3,000, stating the distributive amount of each beneficiary, and shall give all information as required in said list returns, and *shall withhold and pay to the collector, as provided by law, the normal tax of* 1 *per cent upon the distributive interest of each of said beneficiaries in excess of* $3,000, *the same as if said income was actually distributed and paid;* exemption under paragraph C, however, may be claimed by the beneficiary or his legal representative by filing his claim for exemption with the fiduciary agent.

When the fiduciary agents deduct, withhold, and pay the normal tax *on undivided annual net income* as provided herein, they shall not be required to withhold and pay again the normal tax on said income when actually distributed and paid to said beneficiaries, nor shall the beneficiaries be required again to pay the normal tax on the amounts on which the tax has been paid when such amounts are distributed."

T. D. 1943:

"The amount to be shown on page 1, line (5), will represent the total amount of income accruing through the fiduciary to the beneficiaries of the estate or trust *which is subject to the normal tax,* and when the interest of any one beneficiary in this amount was in excess of $3,000, *whether distributed or not, the fiduciary was required to withhold and*

pay the normal tax on the whole \$3,000 and excess thereof, unless the beneficiary filed with the fiduciary Form 1007, as prescribed by the regulations, claiming exemption under paragraph C, and in that event the fiduciary was only required to withhold and pay the normal tax on the amount in excess of the exemption claimed."

The Commissioner under the act also made the following rulings:

"No return required of fiduciary unless some one beneficiary's interest, subject to the normal tax, exceeds \$3,000."

Dated January 15, 1915.

"A return of income by a fiduciary is required if the distributive interest of any one beneficiary in the amount entered on line 5, page 1, of form 1041 revised, exceeds \$3,000."

Income Tax Service 1915, pp. 379-396.

On July 26, 1915, the Commissioner of Internal Revenue issued new instructions in regard to the assessing and collecting of income taxes, which for the first time sought to enforce a tax upon income accumulated for unascertained persons in the hands of trustees as an entity, which instructions are, in part, as follows (Corporation Trust Company Income Tax Service 1915, p. 493):

"Fiduciaries shall, on or before March 1 of each year, make and render a return, in form prescribed by the Commissioner of Internal Revenue, of the income coming into their custody or control and management from each trust estate when the annual interest of any beneficiary in the income of said trust estate subject to the normal tax is in excess of \$3,000, and also when the undistributed income of the estate (as an entity or beneficiary in and of itself for tax purposes), consisting of income from dividends of corporations and other income (or of dividends alone), shall exceed \$20,000. In such cases the

estate shall be reported as a beneficiary for the undistributed income.

Notice of failure to file a return as required shall be served upon the fiduciary.

*   *   *   *   *

The income of trust estates, as any other income, is subject to the income tax. When such income is received annually by a beneficiary of an estate, the fiduciary will withhold the normal tax due and subject to withholding by him. Any part of the annual income of trust estates not distributed becomes an entity, and, as such, is liable for the normal and additional tax, which must be paid by the fiduciary. When the beneficiary is not *in esse* and the income of the estate is retained by the fiduciary such income will be taxable to the estate as for an individual and the fiduciary will pay the tax both normal and additional. When the beneficiary receives a part only of the income to which he is entitled from the estate and the balance is retained by the fiduciary, the normal tax will be withheld on the income paid to the beneficiary and the amount of such income retained by the fiduciary will be treated as income taxable to the estate for both the normal and additional tax; which tax will be paid by the fiduciary. When the gross net income not distributed and remaining in the hands of a fiduciary is less than $20,000, the estate will be listed as a beneficiary and only the normal income tax will be assessable and such tax will be paid by the fiduciary. When the gross net income not distributed and remaining in the hands of a fiduciary exceeds $20,000, such income is subject to both the normal and additional tax and the estate will be listed as a beneficiary and both the normal and additional tax will be paid by the fiduciary. * * * Treasury Decisions 1906 and 1943 and Articles 70, 71, 74 and 75 of Regulations 33 and all other regulations so far as inconsistent herewith are hereby superseded."

THE ACT OF 1916.

By an act approved September 8, 1916, the Income Tax Act of 1913 was revised, and the following new provision was added:

"SEC. 2 (b) Income received by estates of deceased persons during the period of administration or settlement of the estate, shall be subject to the normal and additional tax and taxed to their estates, and *also such income of estates or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests, and income held for future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be: Provided,* That where the income is to be distributed annually or regularly between existing heirs or legatees or beneficiaries the rate of tax and method of computing the same shall be based in each case upon the amount of the individual share to be distributed.

Such trustees, executors, administrators, and other fiduciaries are hereby indemnified against the claims or demands of every beneficiary for all payments of taxes which they shall be required to make under the provisions of this title, and they shall have credit for the amount of such payments against the beneficiary or principal in any accounting which they make as such trustees or other fiduciaries."

The Act of 1916 also provides:

"SEC. 8 (c) Guardians, trustees, executors, administrators, receivers, conservators, and all persons, corporations, or associations acting in any fiduciary capacity, shall make and render a return of the income of the person, trust, or estate for whom or which they act, and be subject to all the provisions of this title which apply to individuals. Such fiduciary shall make oath that he has sufficient knowledge of the affairs of such person, trust, or estate

to enable him to make such return and that the same is, to the best of his knowledge and belief, true and correct, and be subject to all the provisions of this title which apply to individuals:"

Vol. 39, U. S. Statutes, pp. 757-762.

THE INTERNAL REVENUE ACT OF 1918.

This act has the following provisions relating to the taxation of income in the hands of fiduciaries:

"ESTATES AND TRUSTS.

SEC. 219 (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

(2) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests;

(3) Income held for future distribution under the terms of the will or trust; and

(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

(b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that there shall also be allowed as a deduction (in lieu of the deduction authorized by paragraph (11) of subdivision (a) of section 214) any part of the gross income which, pursuant to the terms of the will or deed creating the trust, is during the taxable year paid to or permanently set aside for the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, or any

corporation organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; and in cases under paragraph (4) of subdivision (a) of this section the fiduciary shall include in the return a statement of each beneficiary's distributive share of such net income, whether or not distributed before the close of the taxable year for which the return is made.

(c) In cases under paragraph (1), (2), or (3) of subdivision (a) the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216."

"Fiduciary Returns.

Sec. 225. That every fiduciary (except receivers appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for the individual, estate or trust for which he acts (1) if the net income of such individual is $1,000 or over if single or if married and not living with husband or wife, or $2,000 or over if married and living with husband or wife, or (2) if the net income of such estate or trust is $1,000 or over, or if any beneficiary of such estate or trust is a nonresident alien, stating specifically the items of the gross income and the deductions and credits allowed by this title. Under such regulations as the Commissioner with the approval of the Secretary may prescribe, a return made by one of two or more joint fiduciaries and filed in the office of the collector of the district where such fiduciary resides shall be a sufficient compliance with the above requirement. The fiduciary shall make oath that he has sufficient knowledge of the affairs of such individual, estate or

trust to enable him to make the return, and that the same is, to the best of his knowledge and belief, true and correct.

Fiduciaries required to make returns under this act shall be subject to all the provisions of this act which apply to individuals." (p. 1074.)

Vol. 40 U. S. Statutes, p. 1071-1074.

ARGUMENT.

The Act of 1913 levied the income tax only on persons, and not on property. The persons taxed were only those receiving income in their own right. No tax was levied upon income apart from the person beneficially entitled thereto. The paragraphs of the act levying or imposing the income tax are separate and distinct from the provisions of the act which provide for the method of ascertaining the taxable income, and assessing and collecting the same. The clauses so levying the income tax are contained in paragraphs "A" and "G," and are set forth *ante*, page 3.

Paragraphs "B," "C," "D," "E" and "F" specify and define the methods of ascertaining the taxable income and making returns thereof, and the collection of the same.

The subject matter of these later paragraphs does not include the imposition of a tax upon any income.

It is sought in this case to sustain the taxes in question under a clause contained in paragraph "D," which provides for the making of returns by trustees

> "of the net income of the person for whom they act, *subject to this tax*, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals."

This clause not only does not in terms impose a tax upon income, but limits the obligation imposed to the making of a return of income "subject to this tax"; *i. e.*, income which is taxable under paragraph "A" or paragraph "G."

I.

RULE OF CONSTRUCTION.

"THERE MUST BE CERTAINTY AS TO THE MEANING AND SCOPE OF LANGUAGE IMPOSING ANY TAX, AND DOUBT IN RESPECT TO ITS MEANING IS TO BE RESOLVED IN FAVOR OF THE TAXPAYER."

Treat v. *White*, 181 U. S. 264, 267.

This proposition is so clearly established by the decisions of this court as not to admit of doubt or question.

In the recent case of *United States* v. *Field*, 255 U. S 257, this court affirmed the above principle as an accepted canon of construction, citing *Gould* v. *Gould*, 245 U. S. 151, 153, where this court said:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to *enlarge their operations so as to embrace matters not specifically pointed out*. In case of doubt they are construed most strongly against the government, and in favor of the citizen."

II.

THE CASE OF THE MERCHANTS' LOAN & TRUST COMPANY V. SMIETANKA (255 U. S. 509), IS NOT AN AUTHORITY IN SUPPORT OF THE GOVERNMENT'S CONTENTION IN THIS CASE THAT A TRUSTEE IS TAXABLE UPON ACCUMULATED INCOME UNDER THE ACT OF 1913.

This case is cited as an authority in support of the Government's contention. (Arg., pp. 9, 10.)

The question at issue here was not involved, discussed or decided in The Merchants' Loan & Trust Company case. The question at issue in that case was whether a gain from capital realized by a sale was taxable as in-

come. The case arose under the Internal Revenue Acts of September 8, 1916, and October 13, 1917, which specifically provided for the taxation of accumulated income in the hands of trustees.

In its opinion the court found from the provisions of the Acts of 1916 and 1917 that

> "it is the plainly expressed purpose of the Act of Congress to treat such a trustee as we have here as a 'taxable person,' and for the purposes of the Act to deal with the income received for others precisely as if the beneficiaries had received it in person." (p. 517.)

This conclusion is based upon two clauses or paragraphs quoted in the opinion of the court from the Acts of 1916 and 1917, as follows:

> "That the trustee was such a 'taxable person' is clear from section 1204 (1) (c) of the Act of October 3, 1917, c. 63, 40 Stat. 331, which requires that 'trustees, executors * * * and all persons, corporations, or associations, acting in any fiduciary capacity, shall make and render a return of the income of the person, trust, or estate for whom or which they act, and be subject to all the provisions of this title which apply to individuals.'
>
> And section 2 (b) of the Act of September 8, 1916, *supra*, specifically declares that the 'income received by estates of deceased persons during the period of administration or settlement of the estate, * * * or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests, and income held for future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be.'" (pp. 516-517.)

In the Government brief the above clause of the Act

of October 3, 1917, only is quoted, and the statement is made that

> "In respect to the question whether or not a trustee is a taxable person, the provisions quoted by the court from the Act of October 3, 1917, and the provisions of the Act of 1913 here relied upon are practically identical."

We do not assent to the correctness of this statement.

The following are quotations of the clause in question in the respective Acts of 1913 and 1917. The words in italics in Act of 1913 are stricken out by the amendment, and the words in italics in the Act of 1917 are new.

Act of 1913:

> "Guardians, trustees, executors, administrators, *agents,* receivers, conservators, and all persons, corporations or associations acting in any fiduciary capacity, shall make and render a return of the *net* income of the person for whom they act, *subject to this tax, coming into their custody or control and management,* and be subject to all the provisions of this *section* which apply to individuals."

Act of 1917:

> "Guardians, trustees, executors, administrators, receivers, conservators, and all persons, corporations or associations acting in any fiduciary capacity, shall make and render a return of the income of the person, *trust or estate* for whom *or which* they act, and be subject to all the provisions of this *title* which apply to individuals."

Under the Act of 1917 the duty of the fiduciary was not limited to the making of "a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management," but was extended so as to require the trustee to render "a return of the income of the person, trust or estate for whom or which they act."

The addition of the words "trust or estate" was made by the amendment of 1916, which in specific terms levied a tax upon the income accumulated in the hands of a trustee for the benefit of unascertained persons, and directed such tax to be assessed to the trustee. The changes by the Act of 1916 for the first time made it the duty of the trustee to return income accumulated for unascertained persons and to pay income taxes thereon.

It is entirely clear that the question as to whether a trustee holding accumulated income was a taxable person under the Acts of 1916 and 1917, which in specific terms provided for the taxation of such income to the trustee, was entirely different from the same question under the Act of 1913, which contained no specific provision for the taxation of such accumulated income, and contained no provision authorizing the trustee to pay a tax on such income.

The Merchants' Loan & Trust Company case not only arose under the Acts of 1916 and 1917, but the court's decision was specifically based upon the provisions of said two acts under which there was no room for doubt or difference of opinion as to the trustee being a taxable person.

III.

THE CONTENTION OF THE GOVERNMENT THAT

"THE FIDUCIARIES REQUIRED TO MAKE REPORTS ARE THOSE WHO RECEIVE INCOME FOR THE PURPOSE OF GUARDING AND PRESERVING IT, AND EXERCISING A CONTINUING CONTROL OVER IT, NOT THOSE WHO MERELY DISPOSE OF IT. THE LAW, IN OTHER WORDS, APPLIES TO TRUSTEES WHO ACCUMULATE, OR AT LEAST DO NOT IMMEDIATELY DISBURSE, THE TRUST INCOME WHICH THEY RECEIVE," IS NOT SUSTAINABLE. (Arg., p. 12.)

The above proposition is essential to the government's

case. The claim made is that a tax is levied upon accumulated income by the clause of the act which provides that fiduciaries "shall be subject to all the provisions of this section which apply to individuals."

This clause is general in its terms, and is applicable to all returns required to be made by fiduciaries. If the clause is construed to require fiduciaries to make return in all cases of the net income received by them from trust funds, it would follow from the government's contention that double income taxes would be collected in most cases—first, from the trustee, and, second, from the beneficiary receiving the net income from the trustee. The government is, therefore, forced to the position taken, that the Act of 1913 required fiduciaries to make a return of income *only* in cases where such income was retained by the trustee and not paid over to a beneficiary. Is this position tenable?

The paragraph in which the clause in question occurs is as follows:

> "guardians, trustees, executors, administrators, agents, receivers, conservators, and all persons, corporations, or associations acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals:
>
> * * * * *
>
> and *also all persons, firms, companies, copartnerships, corporations, joint-stock companies or associations, and insurance companies,* except as hereinafter provided, *in whatever capacity acting,* having the control, receipt, disposal, or payment of fixed or determinable annual or periodical gains, profits, and income of another person subject to tax, shall in behalf of such person deduct and withhold from the payment an amount equivalent to the normal income tax upon the same and make and render a re-

turn, as aforesaid, but separate and distinct, of the portion of the income of each person from which the normal tax has been thus withheld, and containing also the name and address of such person or stating that the name and address or the address, as the case may be, are unknown:" (Italics ours.)

The contention is made that the second clause of the above paragraph, commencing with the words "and also all persons, firms," etc., does not include the fiduciaries named in the first clause, viz: "guardians, trustees, executors," etc., and that therefore fiduciaries were not required to make a return of incomes paid over by them to the beneficiaries, and to state in their return the name and address of each beneficiary. It is claimed that a distinction is made in the statute between fiduciaries having the control and management of income and disbursing agents. (Arg., pp. 12-16.) This distinction involves the proposition that fiduciaries were not required by the Act of 1913 to make return of distributable income, or to pay and withhold the normal tax thereon. The distinction can only be upheld by holding that the second clause above mentioned does not include the fiduciaries included within the first clause.

But the description of the persons falling within the second clause is as comprehensive as language could make it. "All persons * * * in whatever capacity acting, having the control, receipt, disposal or payment * * * of income of another person, subject to tax, shall in behalf of such person deduct," etc.

A trustee or fiduciary receiving income from a trust fund and paying it over to a beneficiary falls clearly and specifically within the language used. But if there were any doubt it is removed by paragraph "E," in which the description of the persons designated is identical with that in the second clause, and which specifically provides

that the persons so designated shall include "lessees, mortgagors of real or personal property, *trustees acting in any capacity, executors, administrators, agents, receivers, conservators,* employers, and all officers and employees of the United States having the control, receipt, custody, disposal or payment * * * of income of another person."

Paragraph "E" specifically requires trustees acting in any capacity to deduct and withhold the normal tax on trust income, and to pay the same to the collector, and they are made personally liable for such tax; that is to say, a trustee paying income to a beneficiary was, by the Act of 1913, requiring to withhold an amount equal to the normal tax from the payments made to the beneficiary, and to pay the amount so withheld to the collector. This withholding and payment was required to be evidenced by the sworn return made by the trustee under the clause in paragraph "D" above quoted specifically stating the name of the beneficiary on whose behalf payment is made.

The Treasury Department, under its regulations and forms, has always required trustees and other fiduciaries to make returns of all income received from trust funds which were distributable or payable to beneficiaries.

By T. D. 2090 it was provided:

> "Fiduciaries are required to make a return on Form 1041, revised, whenever the interest of any one beneficiary in the income from the estate or trust subject to the normal tax is in excess of $3,000. This duty can not be delegated to another person. When the interest of any one beneficiary exceeds $3,000 and a return is required, the name and full address of each beneficiary and the share of income to which entitled even though it be less than $3,000, must be shown; and in all cases where the beneficiary's interest is in excess of $3,000 the fiduciary

is required to withhold the normal tax unless exemption is claimed under paragraph C, and then only on the amount in excess of the exemption so claimed."

By T. D. 2137 it was provided:

"A return of income by a fiduciary is required if the distributive interest of any one beneficiary in the amount entered on line 5, page 1, of Form 1041, revised."

Under the instructions printed on Form 1041 every fiduciary was required to make a return when the annual interest in any income accruing and payable to any beneficiary through such fiduciary exceeded $3,000.

Under the statute of 1913, and every amendment thereto, and under the statutes and regulations in force at all times since 1913, fiduciaries have been required to make a return of the income of trust funds in their hands where the same were payable to known beneficiaries and to give the names of the beneficiaries and the amount of income payable to each beneficiary.

Article 341 of Regulations under the Act of 1918 provides:

"While certain estates and trust are subject to tax as such and others are not, the fiduciary in every case is required to make a return of income."

IV.

THE ORIGINAL RULING OF THE TREASURY DEPARTMENT THAT "THE INCOME TAX CAN BE LEVIED ONLY ON SUCH INCOME AS IS PAYABLE TO SOME NATURAL OR ARTIFICIAL PERSON, SUBJECT TO THE PROVISIONS OF THE LAW," WAS CORRECT.

This ruling was made in a letter by Deputy Commissioner Speer, dated February 9, 1915, published by the Treasury Department. On July 26, 1915, the Commis-

sioner of Internal Revenue issued new instructions, which for the first time sought to levy a tax upon income accumulated for unascertained persons in the hands of trustees as an entity. (*Ante*, page 8.) These instructions were in part as follows:

> "Any part of the annual income of trust estates not distributed becomes an entity, and as such is liable for the normal and additional tax which must be paid by the fiduciary."

Mr. Justice Baker, in delivering the opinion of the Circuit Court of Appeals, in passing upon these rulings of the Treasury Department, said:

> "The department's first rulings were in harmony with the natural import of the language used by Congress; its later ruling does more than violate the canon that doubts and ambiguities are to go against the government, for it is based, not upon any uncertainty in the terms of the act, but upon a metamorphosis of a body of property into a person, and upon exactions contrary to the exemptions in the Act of 1913."

And again,—

> "Our reading of the act accords with the many and uniform rulings of the Treasury Department from the passage of the act down to July 26, 1915. Treas. Dec. No. 1906, issued November 28, 1913; Income Tax Regulations No. 33, Articles 70, 71, 74 and 75, issued January 5, 1914; Treas. Dec. No. 1943, issued February 4, 1914; Treas. Dec. No. 2090, issued December 14, 1914; Rulings on January 15 and 30, and February 9 and 27, 1915, in Income Tax Service 1915, on pages 379, 396, 426, 438; and the opinion of the Attorney General rendered to the Treasury Department on February 12, 1914, in Income Tax Service 1914 at page 260."

In September, 1916, the Income Tax Act of 1913 was revised and a new provision was added. Section 2 (b), hereinbefore quoted, which directed the tax "to be as-

sessed to the executor, administrator or trustee," and not to the accumulated income as an entity.

This narration makes it clear that the Act of 1913 did not clearly and specifically tax accumulated income held for unascertained persons. The subject matter in controversy arose immediately after the Act of 1913 went in force. No claim was made by the government that income taxes were levied on such accumulated income until July 26, 1915, more than two years after the act was in operation, and in the meanwhile the Treasury Department had ruled that such income was not subject to tax under the provisions of the law.

The Act of 1916 was clearly passed for the purpose of supplying the omission, and provided for the levy of taxes upon such accumulated income.

The case is strikingly similar to the case of *United States* v. *Field,* 255 U. S. 257, in which the omission to levy an estate tax upon property passing under a general power of appointment, was sought to be remedied—first, by a ruling or instruction of the Treasury Department, and, secondly, by an amendment of the statute specifically taxing property passing under a general power of appointment.

In that case the government sought to sustain a tax levied before the amendment by contentions similar to those made in this case. The tax was held unauthorized, the court saying:

> "It would have been easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by a decedent had such a purpose existed; and none was expressed in the act under consideration. In that of February 24, 1919, which took its place, the section providing how the value of the gross estate of the decedent shall be determined contains a clause precisely to the point (sec. 402 (e), 40 Stat. 1097): 'To the ex-

> tent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except,' etc. Its insertion indicates that Congress at least was doubtful whether the previous act included property passing by appointment." (pp. 264-5.)

In this case it would have been easy for Congress to have made a specific provision taxing accumulated income for unascertained persons. This was done by the amendatory act, and the amendatory act was clearly passed because Congress was at least doubtful whether the existing act imposed a tax upon such accumulated income.

It is clear that by its contention the government seeks to extend the import of the language used in the Act of 1913 so as to embrace matters not specifically pointed out. At the very least there is grave doubt as to whether the construction contended for by the government can fairly be applied to the Act of 1913, and in such case the rule is that the doubt must be resolved against the government and in favor of the citizen.

V.

THE TAX IN QUESTION CANNOT BE SUSTAINED ON THE GROUND THAT ITS LEVY FALLS WITHIN THE GENERAL PURPOSE OF THE ACT.

The argument is pressed that it was the intention of Congress to levy the income tax upon all income, and that the act should be so construed as to carry out this general intention on the part of Congress.

This same contention was made by the government and overruled by this court in the case of *United States*

v. *Field, supra,* in which it was claimed that it was the general intention of Congress to levy an estate tax on all property passing from one person to another by reason of death, and that, therefore, property passing under a general power of appointment should be taxed.

If there are clear and express words contained in the act levying an income tax upon accumulated income, there is no need of resorting to conjecture in regard to the general intention of Congress in passing the act. On the other hand, if there are no clear and express words in the act levying the tax, it cannot be sustained on any conjecture as to the intention of Congress. The words of the act

> "* * * must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names *or reports accompanying their introduction, or from any extraneous source.*"
>
> *Caminetti* v. *United States*, 242 U. S. 470, 490.

> "The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture."
>
> *Thompson* v. *United States*, 246 U. S. 547-551.

> "* * * the intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language."
>
> *Eidman* v. *Martinez*, 184 U. S. 578.

It is contended that Congress could not have intended that accumulated income of trust funds should be exempt from taxation. It is not sufficient to sustain the tax to find that Congress had no affirmative or conscious intention to omit accumulated income from income taxes. It is sufficient to defeat the tax that Congress did not af-

firmatively provides specifically for the taxation of accumulated income. A case of omission by oversight is sufficient to defeat the tax. We respectfully submit that there is no specific language in the Act of 1913 which clearly imposes a tax upon accumulated income for unknown persons in the hands of trustees, and that the judgment of the court below should be affirmed.

John P. Wilson,
William B. Hale,
Walter Bruce Howe,
Attorneys for Respondent.

APPENDIX.

Opinion of the Circuit Court of Appeals, Seventh Circuit, in the case of *First Trust & Savings Bank* v. *Smietanka, Internal Revenue Collector:*

"BAKER, *Circuit Judge.* Plaintiff in error, as trustee under the will of Otto Young, filed a declaration to recover income taxes assessed against the estate under the Internal Revenue Act of October 3, 1913 (38 Stat. 167), and paid under protest. A general demurrer was sustained, and judgment for costs followed.

Otto Young's will, after disposing of portions of the income during the lives of his widow and four daughters and until his youngest surviving grandchild should attain the age of 21, provided:

> '6. When the last survivor of my daughters shall have deceased and the youngest surviving child of my daughters shall have attained the age of twenty-one years, all of said trust estate then remaining in the hands of said trustee shall be divided in equal shares between my grandchildren, the surviving issue of any deceased grandchild to receive the share which such deceased grandchild would have been entitled to receive if then living. * * * The excess, if any, of the income of said trust estate, over and above the payments hereinbefore provided to be made therefrom, shall be accumulated in the hands of said trustee and form a part of said trust estate, subject to the like control and power of disposition on the part of said trustee as the principal of said trust estate.'

If a decedent's estate produces an increment which is payable only at times and to persons not now determinable, is such increment during a tax year an

income of that tax year, which is assessable under the Internal Revenue Act of October 3, 1913? Provisions essential to the answer are as follows:

> Paragraph A, subd. 1: 'There shall be levied * * * and collected annually (a tax) upon the entire net income * * * accruing from all sources in the preceding calendar year.
>
> (1) To every citizen of the United States, whether residing at home or abroad, and
>
> (2) To every person residing in the United States, though not a citizen thereof * * * and
>
> (3) A like tax * * * upon the entire net income from all property owned and of every business, trade or profession carried on in the United States by persons residing elsewhere.'
>
> Paragraph A, subd. 2: 'In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be levied * * * and collected upon the net income of every individual an additional income tax of * * *'
>
> Paragraph B: 'Subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include * * * income * * * growing out of * * * interest in real or personal property * * * and income derived from any source whatever.'
>
> Paragraph D: 'Guardians, trustees, * * * and all persons, corporations, or associations acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals.'
>
> Paragraph E: After providing for withholding the normal tax at the source, and making various requirements concerning returns and assessments, this paragraph continues: 'The tax herein imposed upon annual gains, profits, and income not falling under the foregoing and

not returned and paid by virtue of the foregoing, shall be assessed by personal return, under rules and regulations to be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury.'

Paragraph G (a): 'The normal tax hereinbefore imposed upon individuals likewise shall be levied * * * upon the entire net income * * * accruing from all sources during the preceding calendar year to every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships.'

(1) Inasmuch as all persons and property within the jurisdiction of a sovereignty are subject to taxation, and since the property cannot speak and the persons have no direct voice in wording the tax laws, it is a fundamental duty of the law-givers to make the scope of a tax law definite and its meaning clear; and therefore all doubts respecting scope and meaning are to be resolved in favor of the taxpayer. *Treat* v. *White*, 181 U. S. 264, 21 Sup. Ct. 611, 45 L. Ed. 853; *Gould* v. *Gould*, 245 U. S. 151, 38 Sup. Ct. 53, 62 L. Ed. 211.

(2) By citing this rule we do not imply that there is in the Act of 1913 an ambiguity which must be construed against the government. In our judgment nothing could be clearer than the absence of any legislative intent to tax a property increment which during the tax year had no owner in being who received or was entitled to receive any of such increment. Paragraph A lays a tax each year upon the net income accruing in the preceding calendar year. Paragraph B defines net income as that which comes in from any interest in real or personal property and from any other source whatever. Subdivi-

sion 1 of paragraph A and paragraph G (a) condition the levy upon the fact that the income, either actually or potentially, and with full right of immediate disposition, comes into the hands of either a citizen, wherever resident, or a person who is a resident, but not a citizen, or a person who is neither a citizen nor a resident, but who owns property or carries on business here, or a corporation, joint-stock company, or association, or insurance company, organized in this country.

Otto Young's estate consists, say, of a great commercial building in a great commercial city; the net rentals, after payment of insurance, local taxes, maintenance and operation, exceed the amount required by the trustee to pay the annuities to the widow and children; at some remote period the estate as it máy then exist is to be turned over to persons now unknown, possibly not now in existence; and in the meantime the estate is growing in value by reason of the rise in real estate and also by the accumulation of rentals. But neither the real estate as valued at Young's death, nor the increase in value, nor the accumulation of rentals, is a citizen or person or corporation, joint-stock company or association, or insurance company, mutual or stock. In no calendar year preceding a levy was there any sort of being to whom the trustee could pay or account for the accumulations of rentals. Paragraph D of course did not lay upon the trustee the duty of returning these accumulations as part of its own income. That paragraph required the trustee to report what it received for another who, if acting in his own behalf, would be called upon to show what he had received or was entitled to receive, with full power of immediate disposition, during the preced-

ing calendar year. Paragraph E, the only other part of the act referred to by government counsel, plainly adds nothing to the 'tax imposed,' but is concerned only with methods of administration.

Our reading of the act accords with the many and uniform rulings of the Treasury Department from the passage of the act down to July 26, 1915. Treas. Dec. No. 1906, issued November 28, 1913; Income Tax Regulations No. 33, Articles 70, 71, 74 and 75, issued January 5, 1914; Treas. Dec. No. 1943, issued February 4, 1914; Treas. Dec. No. 2090, issued December 14, 1914; Rulings on January 15 and 30, and February 9 and 27, 1915, in Income Tax Service 1915 on pages 379, 396, 426, 438; and the opinion of the Attorney General rendered to the Treasury Department on February 12, 1914, in Income Tax Service 1914 at page 260.

In Treas. Dec. No. 2231, issued July 26, 1915, the Department declared that—

> 'Any part of the annual income of trust estates not distributed becomes an entity and as such is liable for the normal and additional tax, which must be paid by the fiduciary. When the beneficiary is not *in esse* and the income of the estate is retained by the fiduciary, such income will be taxable to the estate as for an individual and the fiduciary will pay the tax both normal and additional.'

This ruling was the cause of the present and other similar suits. It illustrates the not unnatural tendency of tax officers to increase the revenues by implications and strained constructions. The department's first rulings were in harmony with the natural import of the language used by Congress; its later ruling does more than violate the canon that doubts and ambiguities are to go against the gov-

ernment, for it is based, not upon any uncertainty in the terms of the act, but upon a metamorphosis of a body of property into a person, and upon exactions contrary to the exemptions in the Act of 1913. If the unascertained residuary legatees were now at hand to receive from the trustee the accumulations of the preceding calendar year, they might be such in number as that nothing but the normal tax on the share of each in excess of his personal exemption could be assessed; but the department, by converting an estate into a personal entity, cuts off all personal exemptions and by adding the shares together subjects each share to the rates of surtaxes that are calculable on the sum total. If the residuary legatee were a charitable or educational institution, the department's method would add to the detriment due to the testator's postponement of the benefit the taxes and surtaxes throughout the period of postponement. Congress recognized that such alterations and amendments were legislative and passed the amendatory act of September 8, 1916 (39 Stat. 756), levying a tax upon undistributed income added to the principal of trust estates.

The judgment is reversed and the cause remanded for further proceedings in consonance with this opinion."

268 Federal Rep. pp. 230-233.